

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*original + affidavit
of mailing*

77-1353

To be argued by
HARVEY M. STONE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1353

In Re Grand Jury Subpoena Directing EDWARD
TAYLOR To Appear and Testify Before a Grand
Jury On July 20, 1977 at 10:00 A.M.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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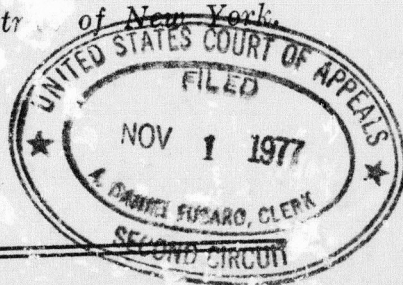




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Jury on July 20, 1977 at 10:00 A.M.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Edward Taylor appeals from an order of the United States District Court for the Eastern District of New York (Bramwell, J.) prohibiting him from retaining William Erlbaum, Esq., to serve as his attorney in connection with a grand jury subpoena compelling appellant's appearance before that grand jury, which was and is conducting an investigation of possible criminal activities in the operation of direct lease day care centers in the City of New York. The district court's disqualifying order issued in response to a motion by Assistant United States Attorney Stanley Marcus (who is involved in conducting the grand jury proceedings) alleging that Mr. Erlbaum's representation of appellant was inappropriate in light of his prior and continuing representation of several other witnesses who are subjects (or "targets") of the grand jury investigation.

After conducting an inquiry into the matter and reviewing certain materials submitted by the government

for *in camera* inspection, the district court ruled that the likely conflict of interest caused by Mr. Erlbaum's representation of appellant necessitated the order in question. In its order the district court further required that the materials submitted by the government for the court's *in camera* inspection be sealed pending further order of that court.

Appellant contends here that the order prohibiting him from retaining Mr. Erlbaum violated his constitutional right to representation by the particular counsel of his choice; he also contends that the district court's reliance on materials which were not available for appellant's inspection deprived him of due process.

Statement

In June 1976 a special grand jury was empanelled pursuant to law within the Eastern District of New York. This grand jury, and the United States Attorney's Office for the Eastern District of New York, has been investigating since that time numerous federal crimes, all related to the organization, construction and operation of direct lease day care centers in New York—including possible violations of 18 U.S.C. §§ 1951 (extortion), 1952 (use of interstate facilities to promote extortion and bribery), and 371 (conspiracy); and 26 U.S.C. §§ 7201 (tax evasion) and 7206 (filing of false tax returns) (A. 8).¹ The grand jury's investigations have revealed evidence implicating Leonard Simon, Jeffrey Podell and Gary Joseph—who have been (or will be) called by the grand jury to testify and who have been represented in connection with that investigation by

¹ "A." refers to appellant's Appendix, which reproduces (*inter alia*) the transcript of proceedings before the district court on July 29, 1977.

Mr. Erlbaum (A. 7-10). On July 19, 1977, after Mr. Erlbaum had been representing Simon, Joseph and Podell in this matter, appellant was subpoenaed to appear before the grand jury (A. 7). Appellant notified Assistant United States Attorney Marcus that he had retained Mr. Erlbaum to represent him with respect to the grand jury proceedings (A. 7). Marcus thereupon advised Mr. Erlbaum that the government firmly believed, on the basis of evidence disclosed in the grand jury investigation, that appellant's testimony before the grand jury would necessarily "pit him" against Mr. Erlbaum's other clients, Podell, Simon and Joseph (A. 10). Marcus further informed Mr. Erlbaum, who had already been advised that some of his clients were targets of the investigation, that the United States Attorney's Office would seek a formal "use immunity" order to compel appellant's testimony in the event that appellant refused to answer questions before the grand jury on Fifth Amendment grounds (A. 10).²

After Mr. Erlbaum refused to disassociate himself from appellant's representation, Assistant United States Attorney Marcus sought a disqualification order from the district court (A. 10). Marcus advised Mr. Erlbaum at the time that, in order to demonstrate the conflict more clearly, the government would submit to the court *in camera* certain materials, including an affidavit by Marcus and testimony before the grand jury (A. 10-11).

² At some time prior to the subpoena directing appellant's appearance, the United States Attorney's Office advised Mr. Erlbaum of a potential conflict of interest regarding his representation of Simon and Joseph (A. 9). The district court (Neaher, J.) denied the government's motion for a disqualification order on the ground that a conflict had not been sufficiently shown (A. 9, 12). At that time the government had not advised Mr. Erlbaum that it intended to offer immunity to any of his clients then under investigation (A. 12).

Marcus also advised Mr. Erlbaum that these materials could not be revealed to Mr. Erlbaum or any of his clients in the interest of grand jury secrecy—especially since the investigation in question was (and is) still active (A. 11).³

On July 29, 1977, the district court conducted an inquiry regarding the government's motion to disqualify Mr. Erlbaum and to preclude disclosure of the *in camera* materials. Those present included Assistant United States Attorney Marcus, Mr. Erlbaum, appellant, Podell and Simon (A. 6).⁴ Mr. Erlbaum objected to the government's failure to disclose to him or his clients the materials which it proposed to submit under seal to the district court (A. 13). In support of this objection, Mr. Erlbaum asserted that he perceived no conflict of interest in his representing appellant and could not evaluate the government's conflict-of-interest claim without reference to the materials submitted for *in camera* inspection (A. 13-14, 16). Mr. Erlbaum stated that he would stop representing appellant if the government could show the existence of a true conflict (A. 13, 16).⁵ Finally, Mr. Erlbaum observed that he had been representing the witnesses in question for years and that appellant is Simon's brother-in-law (A. 12). Assistant United States Attorney Marcus asserted the government's belief that appellant's testimony would be "very germane" to the investigation, and reiterated that, in light of the ongoing grand jury investigation, there were strong interests militating against disclosing the testimony and appended materials to Mr. Erlbaum (A. 19-22).

³ The grand jury's authority to investigate expires in January, 1978.

⁴ Joseph was then out of town on vacation (A. 7).

⁵ According to Mr. Erlbaum, appellant needed to review the government's materials in order to make a "more intelligent determination" (A. 26).

Following a short recess, the district court—having reviewed the confidential materials—conferred with appellant in chambers outside the presence of Mr. Erlbaum or any government attorney (A. 31). The court explained to appellant the consequences of perjury before the grand jury and of the government's granting immunity to him (A. 32).⁶ The court also told appellant that the confidential materials showed a "likelihood" of a conflict of interest (A. 31-32). The court stated: "From the inspection of [those materials], the Court knows that you will be asked questions requiring you to implicate others" (A. 34). Appellant indicated to the court that he would seek new counsel if the grand jury "were to ask [him] questions that [he] thought would be in direct conflict * * * against any of the people that would be involved" (A. 33). After its conference with appellant, the district court announced to all parties that it was issuing an order (A. 42) prohibiting appellant from retaining Mr. Erlbaum with respect to the grand jury subpoena in question and directing that the government's confidential materials be kept sealed (A. 34-35). Mr. Erlbaum requested a few days in which to consult with his clients about their next step (A. 35-36). This appeal followed.⁷

⁶ Appellant had earlier said that he would be willing to "lose" immunity in order to keep Mr. Erlbaum as his attorney (A. 25).

⁷ In our view the district court's order is a final appealable order since denial of immediate review would probably "render impossible any review whatsoever of [appellant's] claims." *United States v. Ryan*, 402 U.S. 530, 532-533 (1971). See *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 605 n.8 (D.C. Cir. 1976).

ARGUMENT

POINT I

The order of the district court did not infringe on the right to counsel which the Sixth Amendment affords to an "accused" in a "criminal prosecution".

Contrary to appellant's contentions (Br. 6-17), the Sixth Amendment gave him no right to be represented by counsel with respect to appellant's appearance before an investigative grand jury. The Sixth Amendment provides that "[i]n all *criminal prosecutions*, the *accused* shall enjoy the right * * * to have the assistance of Counsel for his *defence*" [emphasis supplied]. U.S. Const., Amdt. VI. It is well settled that this Amendment does not apply to events before the initiation of "adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," *Kirby v. Illinois*, 406 U.S. 682, 688-690 (1972); *United States v. Ash*, 413 U.S. 300, 303 n.3 (1973). Appellant is not an "accused" under the Sixth Amendment. And the grand jury is not an adversary hearing to adjudicate guilt; rather, "it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). The Sixth Amendment right to counsel therefore does not attach to grand jury investigations. *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *In re Groban*, 352 U.S. 330, 333 (1952). See also *United States v. Bennett*, 409 F.2d 888, 899-900 (2d Cir. 1969) (Friendly, J.).

POINT II

Under the circumstances here, appellant has no due process right to be represented by Mr. Erlbaum during the grand jury's investigation.

A conclusion that the Sixth Amendment does not apply to grand jury investigations does not answer the ultimate question of whether appellant is entitled to be represented by Mr. Erlbaum during the grand jury proceedings, but it does "shift the frame of reference from the Sixth Amendment's guarantee of counsel '[i]n all criminal prosecutions' to the Fifth Amendment's prohibition against the deprivation of 'life, liberty, or property without due process of law.'" *Middendorf v. Henry*, 425 U.S. 25, 34 (1976). See *United States v. Ash*, *supra*, 413 U.S. at 321. In determining what process is due to appellant here, we "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action", *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). As we show below, a weighing of the private and governmental interests at stake here shows that appellant has no due process right to be represented by Mr. Erlbaum.⁸

⁸ Appellant also seeks to define his interests with reference to the First Amendment rights to free speech and free association, and the Ninth Amendment right to privacy (Br. 17-19). These rights, too, are not absolute. Indeed, the district court's order places only an incidental burden on appellant's interests in free speech, free association and privacy; and those interests are clearly outweighed by the government's interest in eliminating the conflicts of interest caused here by multiple representation of grand jury witness (pp. 8-18, *infra*). See *Branzburg v. Hayes*, 408 U.S. 665, 682-685, 690-692, 695 (1972); *NAACP v. Button*, 371 U.S. 415, 444 (1963). See also *Pirillo v. Takiff*, 341 A.2d 896, 900-901 (1975).

1. We turn first to an examination of the nature of appellant's interest in being represented by the particular counsel of his choice during the grand jury proceedings. In defining the scope of that interest, it must be kept in mind that a witness called to testify before a grand jury has no constitutional right to have counsel present in the grand jury room during the taking of testimony, even though evidence may be thereby obtained which will possibly lay that witness open to criminal charges. *Mandujano v. United States*, *supra*, 425 U.S. at 581; *In re Groban*, *supra*, 352 U.S. at 332-333. This important limitation on a grand jury witness' right to counsel reflects, *inter alia*, the presumption that the presence of counsel would not be conducive to an economical and thorough ascertainment of facts. See *In re Groban*, *supra*, 352 U.S. at 336 (Frankfurter, J., concurring). As a matter of practice, however, a grand jury witness is permitted while he is being questioned to consult freely with his counsel outside the grand jury room (though the Supreme Court has never decided whether such access to counsel is derived from a right of constitutional dimension).⁹

While we do not think that appellant's interest in representation by the particular counsel of his choice should be treated lightly, it is also important to keep in mind that the district court's order here does not prohibit appellant from retaining counsel in connection with the grand jury investigation. It merely prohibits him from retaining Mr. Erlbaum.¹⁰ Appellant is therefore free to seek out, from a vast field of competent available lawyers, an attorney who will be uninhibited by any

⁹ Appellant's interest in retaining Mr. Erlbaum also encompasses, of course, the use of Mr. Erlbaum's services throughout the course of the grand jury investigation.

¹⁰ Apparently, appellant had originally asked witness Simon (an attorney) to represent him, but Simon refused (A. 29-30).

conflict of interest. Significantly, even in a Sixth Amendment trial context, involving adjudications of guilt and innocence, there is no absolute constitutional right to retain a particular counsel of one's choice. Rather, the right to a particular counsel will yield to overriding governmental interests, including the efficient and effective administration of criminal justice.¹¹ Moreover, an indigent defendant, though his right to effective assistance of counsel is fundamental, is not entitled to particular counsel of his own choosing.¹² It is clear then that an interest in representation by a particular attorney is regarded as less compelling than the general need to be represented by a competent attorney who will provide effective legal assistance. In some cases a grand jury witness' interest in retaining a particular attorney who represents other witness-targets may be based on the expectation that, by planning a common strategy, they will thwart the investigation. To the extent that a witness' preference for a particular attorney (rather than another able attorney) is based on such expectations, a court should give it little if any weight in striking the balance required by due process.¹³

Faretta v. California, 422 U.S. 806 (1975), on which appellant relies (Br. 6), does not confer on him a con-

¹¹ *McGill v. United States*, 348 F.2d 791 (D.C. Cir. 1965); *United States v. Grow*, 394 F.2d 182, 209 (4th Cir. 1968), cert. denied, 393 U.S. 840; *United States ex rel Carey v Rundle*, 409 F.2d 1210, 1214-1215 (3rd Cir. 1969). See *United States v. Abbamonte*, 348 F.2d 700 (C.A. 2, 1965), cert. denied, 382 U.S. 982.

¹² *United States v. White*, 451 F.2d 1225 (6th Cir. 1971); *Smith v. United States*, 331 F.2d 784, 789 (D.C. Cir. 1964). See *United States v. Llanes*, 374 F.2d 712, 717 (2d Cir. 1967), cert. denied, 388 U.S. 917.

¹³ Clearly, no weight should be given to the need for multiple representation by a single attorney when the purpose is collusion. Cf. *Branzburg v. Hayes*, *supra*, 408 U.S. at 696: "[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."

stitutional right to choose a particular counsel during a grand jury investigation. In *Faretta* the Supreme Court held that a defendant has a Sixth Amendment right to represent himself at a criminal trial, a setting where an individual's procedural rights are most carefully protected. See *United States v. Calandra, supra*, 414 U.S. at 349. The Court in *Faretta* repeatedly emphasized that the Sixth Amendment's primary guarantee is the personal right to conduct one's own defense, and that the right to assistance of counsel is merely supplemental to that primary right. *Faretta, supra*, 422 U.S. at 812-834. The Court's holding in *Faretta* was specifically based on its historical analysis of the Sixth Amendment, which (as we have shown) does not apply to grand jury investigations. To the extent that *Faretta* is of some general relevance here, it would seem to give far greater support to an individual seeking self-representation than to one demanding a particular attorney.¹⁴ In addition, *Faretta's* decision to defend himself did not threaten governmental interests comparable to those affected here by the improper and obstructive conflict of interest inherent in Mr. Erlbaum's representation of appellant during the grand jury investigation. See pp. 11-18, *infra*.

Finally, the prospects of conviction and incarceration which appellant faces are considerably more remote than those faced by a defendant in criminal trial. Further, appellant has been informed that the government intends to "immunize" him if he refuses to testify. In that event

¹⁴ We note that the defendant in *Faretta* had specifically expressed an unwillingness to be represented by the public defender (whom he believed to be "loaded down with . . . a heavy case load") and had unsuccessfully moved three times for the appointment of some other attorney to represent him. 422 U.S. at 807, 810 n. 5. The defendant in *Faretta* was thus denied an attorney of his choosing. The instant case, moreover, in contrast to *Faretta*, is not one in which an individual faces the prospect of representation by a particular counsel whom he does not want.

the chances of some eventual criminal conviction related to the activities under investigation are further diminished, and appellant's conduct before the grand jury (conduct which is the main focus of the advice which appellant now seeks from Mr. Erlbaum) will not and cannot be used against him in a criminal prosecution.¹⁵

In short, appellant's interests in retaining Mr. Erlbaum are limited in several important respects; and those interests, while substantial, are hardly equivalent to those of a defendant seeking the in-court presence of his lawyer at an adversarial criminal trial.

2. Balanced against appellant's interests in retaining Mr. Erlbaum are the public interests in preventing the conflict of interest arising from such representation. As detailed in the Statement of Facts, the United States Attorney's Office has made a representation to Mr. Erlbaum that appellant's testimony before the grand jury will likely pit him against three of Mr. Erlbaum's other clients—Podell, Simon, and Joseph—all of whom are targets of the investigation. The government has also told Mr. Erlbaum that if appellant asserts his privilege against self-incrimination, an immunity order will be sought to compel his testimony. Additionally, the government transmitted to the district court an affidavit and certain grand jury testimony which substantiates the representations already made to Mr. Erlbaum.¹⁶ Under

¹⁵ Even assuming *arguendo* that appellant will be indicted by the grand jury, he could conceivably rehire Mr. Erlbaum. At that point the only issue would be whether, as a defendant, appellant knowingly waived a conflict of interest which largely affected his own right to the effective assistance of counsel at trial. Here, as we show, the conflict of interest may have a substantial adverse effect on the ability of the grand jury to carry out its role. See pp. 11-18, *infra*.

¹⁶ As discussed below (pp. 27-28), the government was precluded from disclosing these materials to Mr. Erlbaum because of the weighty need for grand jury secrecy.

these circumstances Mr. Erlbaum cannot properly advise appellant without damaging the interests of his other clients. For example, if Mr. Erlbaum advises appellant to act in a way that may arguably serve appellant's best interests—to testify freely, perhaps actually to seek immunity or to cooperate with the government in other ways—the best interests of Mr. Erlbaum's other clients will be adversely affected. Or if Mr. Erlbaum advises appellant to maintain silence to whatever extent possible and to avoid "cooperation", he may well be acting against the best interests of appellant. In such situations a lawyer's obligation to give zealous protection to his clients as a group can easily preclude the fullest protection for a single client and even lead to a collective decision to "stonewall it."¹⁷

Our primary concern here, however, is not with the effect of such apparent (or possible) conflicts on appellant, who has voluntarily expressed a continuing desire to be represented by Mr. Erlbaum. Rather, it is with the effect of this conflict on several important public interests related to grand jury investigations. These interests include the public's need for an effective and thorough grand jury investigation; the need for the avoidance of actual or seeming improprieties in the grand jury process; and the need for grand jury secrecy.

A. With respect to the vast scope and importance of a grand jury's investigative powers, the Supreme Court has recently observed (*Branzburg v. Hayes*, *supra*, 408 U.S. at 688):

Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers

¹⁷ As noted (n. 6, *supra*), appellant has indicated that he might be willing to forego a grant of immunity in order to keep the services of Mr. Erlbaum (A. 25).

are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition. the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279-281, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence", except for those persons protected by a constitutional, common-law, or statutory privilege * * *, is particularly applicable to grand jury proceedings. [footnote omitted].

"The investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen", *Branzburg v. Hayes*, *supra*, 408 U.S. at 700. Such an "investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed'. *United States v. Stone*, 429 F.2d 138, 140 (C.A. 2, 1970)." *Branzburg v. Hayes*, *supra*, 414 U.S. at 701. Accordingly, "the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." *United States v. Calandra*, 414 U.S. 338, 345 (quoting from *Blair v. United States*, 250 U.S. 273, 281 (1919)). And because of the public interest in the grand jury's investigative powers, "the validity of an indictment is not affected by the character of the evidence considered." *United States v. Calandra*, *supra*, 414 U.S. at 344-345.

In reaffirming the critical importance of the grand jury's role, the Court in *Calandra* further observed (414 U.S. at 343-344):

The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is to be adequately discharged.¹⁸

In light of these principles it is clear that the public has an overriding interest in the prevention of any situation, such as the conflict of interest here, which could obstruct the ability of the grand jury to gather information.

B. A highly significant, related interest threatened by a conflict of interest in multiple representation is the "long established policy" of grand jury secrecy, "older than our nation itself." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400 (1959). See *Branzburg v. Hayes*, *supra*, 408 U.S. at 700. The policy of secrecy reflects a number of concerns, the most significant of which is "the need to encourage free disclosure by those who have information about crimes. This is 'a

¹⁸ See similarly, *United States v. Mandujano*, *supra*, 425 U.S. at 571-576; *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Kastigar v. United States*, 406 U.S. 441, 443 (1972); *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973); *Costello v. United States*, 350 U.S. 359, 362-363 (1956); *Lawn v. United States*, 355 U.S. 339, 350 (1958); *Branzburg v. Hayes*, *supra*, 408 U.S. at 700-702.

reason for secrecy which can be ignored by no court. It is a reason of paramount importance.' " Wright, *Federal Criminal Practice and Procedure*, § 106, p. 171.¹⁹

A witness who is represented by an attorney who owes an obligation to persons against whom the witness may testify cannot help but be intimidated by the fact that the attorney may very well disclose to his associates the fact that the witness has testified and even the substance of that testimony.^{19a} While the witness need not disclose his testimony to his attorney, there is practically no way he can avoid it. Indeed, if he is given immunity, after asserting the privilege, his attorney will certainly be aware of whether he chose to testify or place himself in contempt. Such a breach of the secrecy of the grand jury may have a particularly chilling effect in those cases in which a witness may be involved in organized criminal activity of one kind or another, and has a lawyer supplied to him by others who are targets of the investigation. The witness in this situation may not only be unable to obtain independent counsel without bringing suspicion on himself, but can hardly avoid discussing his grand jury testimony.

Whether we deal with such a case in which the physical safety of the witness is threatened, or with more subtle forms of coercion, such as loss of job, or social ostracism, the one fact that cannot be ignored is that this type of coercion, and the chilling effect it has on the

¹⁹ Of course, the policy of secrecy reflects other important concerns as well. These include the need to prevent the escape of those whose indictments may be contemplated, and to protect grand jurors, as well as witnesses, from being subjected to various kinds of pressures from the targets of the investigation. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681, n. 6 (1959); *In re Biaggi*, 478 F.2d 489 (2d Cir. 1972).

^{19a} It could be argued that the attorney has an affirmative duty to make such disclosures.

witness, is a direct consequence of the breach of secrecy which results when a witness and a target are represented by the same attorney.

C. Finally, conflicts of interests arising from circumstances like those presented here are damaging to the reputation of the grand jury process. Prosecutors, the bar and supervising courts clearly have a special interest in protecting the integrity of such proceedings. The American Bar Association Section of Criminal Justice, with the approval of the ABA House of Delegates, has recently approved grand jury reform legislation adhering to the following principle (No. 21):

A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.²⁰

Similarly, the ABA's Standards Relating to the Defense Function, Section 3.5(b), provide:

Except for preliminary matters such as initial hearing or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.

²⁰ 63 ABA Journal at 1237-1238 (September 1977).

The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such representation.

It is clear from these guidelines that, when a conflict appears possible, doubts should be resolved against multiple representation. The ABA's Code of Professional Responsibility states in this regard (Ethical Consideration 5-15):

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibilities that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests [footnote omitted]; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.* * *

Multiple representation is also generally to be avoided if there is only the appearance of an improper conflict. The ABA's Code of Professional Responsibility provides (EC 9-6) that "[e]very lawyer owes a solemn duty * * *

to strive to avoid not only professional impropriety but also the appearance of impropriety." See *General Motors Corporation v. City of New York*, 501 F.2d 639, 649 (2d Cir. 1974) (" * * * we must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession"). The public prosecutor, moreover, whose role is not purely to advocate his cause, but also to see that justice is done, has an obligation to call to the court's attention any obstructive or seemingly improper conflict of interest. See generally *Singer v. United States*, 380 U.S. 24, 36-37 (1965); *Faretta v. California*, *supra*, 422 U.S. at 839-840; *Berger v. United States*, 295 U.S. 78 (1935). The applicability to the instant case of the public interests underlying these various principles of professional conduct requires no elaboration.

For all of these reasons, we submit that the district court's order prohibiting appellant from retaining Mr. Erlbaum struck a proper balance between the competing private and public interests. Therefore, the order did not violate appellant's right to due process. *United States v. Gopman*, 531 F.2d 262 (5th Cir. 1976); *In the matter of Grand Jury Proceedings*, 428 F. Supp. 273 (E.D. Mich. 1976); *Pirillo v. Takiff*, *supra*, 341 A. 2d 896.

POINT III

The district court's order was not premature.

We also observe that the timing of the district court's order was not premature, but reflected a proper exercise of judicial discretion. Contrary to appellant's suggestion, a conflict need not be an absolute certainty before a disqualification order is appropriate. It should suffice if the conflict is probable, apparent, or even potential (criteria which are all easily satisfied here). As this Court has

observed, a district court may "nip any potential conflict of interest in the bud." *Tucker v. Shaw*, 378 F.2d 304, 307 (1967). A contrary view, we submit, would fail to give proper regard to the public interests at stake in these cases.

It would be particularly imprudent here to delay a disqualification order until after appellant testifies and the details of the conflict have been delineated for all the parties. Such a course of action would necessarily alert Mr. Erlbaum and therefore his other clients to the specific allegations which the grand jury is investigating.²¹ There is no need to risk an obstruction of the grand jury process here, where the government has already demonstrated to appellant the broad contours of the conflict, and has substantiated its assertions with grand jury testimony submitted privately to the court.

In re Investigation Before April 1975 Grand Jury, *supra*, 531 F.2d 600, is not to the contrary. There, an attorney represented 21 witnesses subpoenaed by a grand jury; the government moved for a disqualification order after 19 of the witnesses asserted their privilege against self-incrimination. Aware of the potential conflict, the attorney avoided individual consultations with his clients. In holding that a disqualification order was premature, the court of appeals relied on the fact that, unlike the instant case, the record was barren as to the exact relationship between the attorney and each of the witnesses;

²¹ As we have shown (pp 14-16, *supra*), if appellant testifies while he is still represented by Mr. Erlbaum, Mr. Erlbaum will probably feel obliged to report to his other clients on what transpired during those secret grand jury sessions. Mr. Erlbaum's other clients (as well as Mr. Erlbaum himself) would then be aware of the evidentiary background of the charges contemplated against them, in contravention of important public policies relating to the secrecy and efficacy of the grand jury.

on the record, it was quite possible that some witnesses would have preferred separate representation (*id.* at 607-608). The court also emphasized that it had granted a ten-day stay to allow the government to consider granting immunity to certain witnesses, but that the government had responded that it was not prepared at that time "to make blind selections of random witnesses for possible grants of immunity" (531 F.2d at 604, 609 n.14). The court went on to indicate that a disqualification order would have been proper if the government had offered to immunize certain witnesses (531 F.2d at 609):

As the Second Circuit has recently observed, "[t]he accommodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is the immunity statute." *United States v. Tramunti*, 500 F.2d 1334, 1342, *cert. denied*, 419 U.S. 1079 * * * (1974). Until accommodation in that manner has been demonstrated to be not feasible or contrary to the public interest [footnote omitted], it is surely premature to seek it through disqualification of counsel * * *.

Additionally, there was nothing in that case comparable to the *in camera* documents here in detailing the precise nature of the conflict.

Nor is appellant's position supported by the Third Circuit's decision, *In the Matter of the Grand Jury Empanelled January 21, 1975*, 536 F.2d 1009 (1976). The court there held that the mere invocation of the Fifth Amendment privilege by multiple witnesses was not a basis for disqualifying the attorney who represented them jointly. The court stated that a "conflict could arise" if the government approached the attorney to discuss grants of immunity to one or more witnesses, but that "that point has not been reached" (*id.* at 1011). In

that case, moreover, the attorney had stated that he would "withdraw from representing any witness whom the government approached to discuss immunity or a plea" (*id* at 1013).

POINT IV

Appellant's asserted "waiver" of his right to seek new counsel does not entitle him to representation by Mr. Erlbaum.

As detailed in the Statement, the district court conducted an inquiry to make sure that appellant appreciated the nature of the choice before him. The court warned appellant that, in view of the confidential materials submitted by the government, appellant's testimony would likely "pit him" against Mr. Erlbaum's other clients. Thereafter, appellant and Mr. Erlbaum both decided that, at least in the absence of fuller disclosure, they wanted to maintain their association during the grand jury proceedings.

Appellant's arguable "waiver" of his interests in separate representation²² is clearly not dispositive since appellant, though he can waive his own interests, has no standing to waive the various public interests affected by his retention of conflict-laden counsel before the grand jury. It is settled that a court can reject an attempted waiver if to do otherwise would impair significant countervailing interests. See *United States v. Kaufman*, 429 F.2d 240, 247 (2d Cir. 1970). An individual cannot by

²² It is not altogether clear that, under the facts, appellant's "waiver" of his right to employ separate counsel was truly voluntary and intelligent. See *United States v. Bernstein*, 533 F. 2d 775, 787-788 (2d Cir. 1976); *United States v. Garafola*, — F. Supp. — (D.N.J.), No. 77-1, March 16, 1977 (Lacey, J.). Nevertheless, we do not press here the possible invalidity of the waiver on these grounds.

fiat force the court or the government to consent to a conflict of interest in these circumstances.

In *Singer v. United States*, *supra*, 380 U.S. 24, the Supreme Court held that although a defendant may waive his Sixth Amendment right to trial by jury, there is no constitutional impediment to a procedure conditioning that waiver on the consent of the prosecutor and the government—even though a jury trial is designed “principally for the benefit of the accused” (*id.* at 33). To enforce the waiver, the Court reasoned, would interfere with “legitimate interests” of the prosecution as a servant of justice in procedures regarded by the Constitution as most likely to produce a fair result (*id.* at 36-37). The Court also observed that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right”. *Id.* at 34-35, and cases cited therein.

Significantly, there is language in a number of this Court's recent decisions indicating that attempted waivers of the right to conflict-free counsel need not always be tolerated.²³ Thus, in *United States v. Mari*, 526 F.2d 117, 120-121 (2d Cir. 1975), Judge Oakes stated in a concurring opinion:

* * * given steadily increasing numbers of competent lawyers available, the availability of CJA funds for counsel for the indigent and the prob-

²³ We note that these decisions involve post-conviction assertions of ineffective assistance of counsel due to conflicting interests. In our view, a court should have even greater freedom to reject “waivers” in a case like the instant one, where the proceedings in question are in a relatively early stage and the court can “nip the conflict in the bud” before the proceedings result in any formal determinations. Moreover, the public interests against “conflicts” in the grand jury setting are of a different nature, and arguably weightier, than such interests in the context of a trial or plea.

abilities of conflict of interest inherent in dual representation, it should be only after the most searching inquiry on the part of the court and in those exceptional circumstances where a conflict is not within the realms of reasonable foreseeability that dual representation by defense counsel should be permitted. * * * Such a rule prevents an occasional injustice and, equally important, the appearance of injustice. * * *

* * * It also makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflict exist, and it is also possible that the rights of the public to the proper administration of justice may be affected adversely.

Judge Lumbard expressed a similar view in *United States v. Carrigan*, 543 F.2d 1053 (1976) (concurring opinion). Noting that even defense counsel "may not be in a position to judge whether a conflict of interest between their clients may develop" and that "counsel are frequently unable to foresee developments which may require changes in strategy",²⁴ Judge Lumbard observed (*id.* at 1058):

²⁴ Cf. Mr. Erlbaum's remarks to the district court (p. 13):
 " * * * The answer of the [conflict] test is who are the targets or who are the witnesses and your Honor, these are subject to change."

It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may, in cases such as this, require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.²⁵

In sum, there is no reason why appellant's claimed "waiver" should be the end of the matter here.

POINT V

Appellant was not deprived of due process by the district court's refusal to disclose confidential grand jury materials.

Appellant contends (Br. 20-29) that he was deprived of due process by the district court's decision to put under seal the grand jury testimony (with the accompanying affidavit) submitted by the government to support its showing of a conflict. In discussing his situation

²⁵ See also *Abraham v. United States*, 549 F.2d 236, 239 (2d Cir. 1977) (*per curiam*) ("[D]efendants are not entitled to joint representation as a matter of right.*** In an appropriate case, the court may order that the defendant be represented by independent counsel"); *United States v. Bernstein*, *supra*, 533 F.2d at 788 ("where there is a serious possibility that a definite conflict will arise, the necessities of sound judicial administration require the court to take command of the situation").

with the district court, appellant stated that he would want another lawyer in the event of a conflict (A. 29). Mr. Erlbaum also stated that disassociation would be appropriate if the government could show that appellant will be "pitted against" his other clients (A. 16). "All that [appellant] asks," it is argued here (Br. 16), "is that if a conflict does exist, . . . it be demonstrated." Appellant further asserts that he was deprived of due process not only by a denial of access to the confidential materials, but also by the court's failure to hold a "full adversary evidentiary hearing" on the nature of the conflict (Br. 24).

As is demonstrated by the open record, Mr. Erlbaum represented appellant and three witnesses who are targets of the grand jury investigation. The government represented to appellant that it intended to grant immunity to him if he refused to testify and that, in light of information gathered during the grand jury's inquest, appellant's testimony would pit him against Mr. Erlbaum's other clients. On these facts alone an order of disqualification was proper. In any event, the government supplemented this record by submitting to the district court certain grand jury testimony which provides transactional details underlying the conflict. It must be presumed, of course, that the government had no ignoble motive in submitting the materials for *in camera* inspection.²⁶ Moreover, appellant's interests were sufficiently protected by the district court's review of the confidential materials, subject to further review on appeal.

The courts have often approved *in camera* review of legitimately confidential materials, even in the context of

²⁶ *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *In re Groban*, *supra*, 352 U.S. at 334; *Singer v. United States*, *supra*, 380 U.S. at 36-37.

criminal prosecutions where a defendant seeks exculpatory or impeaching evidence; and disclosure is required only where *in camera* review shows that the defendant's interest in obtaining the materials outweighs the government's interest in secrecy. See, e.g., *Palermo v. United States*, 360 U.S. 343, 354-355 (*in camera* review to determine whether materials are producible under the Jencks Act); *Dennis v. United States*, 384 U.S. 855 (1966) (defendant's request for minutes of completed grand jury investigation); *Pittsburgh Plate Glass Co. v. United States*, *supra*, 360 U.S. at 401 (defendant's request for grand jury minutes); *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973), *appeal dismissed*, 414 U.S. 801, *cert. denied*, 416 U.S. 940 (*in camera* review of taped conversations); *United States v. Pfingst*, 477 F.2d 177, 194-195 (2d Cir. 1973), *cert. denied*, 412 U.S. 941 (Jencks Act materials); *United States v. Annunziato*, 293 F.2d 373, 382-383 (2d Cir. 1961) (review of grand jury materials for inconsistencies with trial testimony); *United States v. Ford*, 550 F.2d 732, 742-743 (2d Cir. 1977) (requirement in Detainers Act that "good cause" for trial postponements be shown in open court did not preclude *in camera* inspection of documents justifying government's delay). Cf. *Ward v. United States*, 76 S.Ct. 1063 (1956) (Frankfurter, J., as Circuit Justice) (approval, on bail petition, of district court's reliance on confidential probation reports).

The relevant factors here clearly justified the district court's refusal to disclose the confidential materials. It is worth bearing in mind that appellant is not a defendant on trial who seeks materials to confront witnesses against him, or to assert a defense. Nor is appellant even an accused who seeks pretrial discovery of exonerating evidence. He is an intended grand jury witness, already offered immunity, who seeks to gain access to materials which the district court, subject to this Court's review, has found supportive of the government's view that his

representation by Mr. Erlbaum presents a conflict of interest (a view that a reasonable person might reach solely on the open record here). With respect to the government's conduct, we note that once the conflict was apparent the government was obligated to bring it to the district court's attention. The government revealed to all parties the relevant factors which were not legitimately confidential. The government, however, could not turn over to Mr. Erlbaum the grand jury testimony on which it relied. Such disclosure would alert the target-witnesses to critical information in the grand jury's possession, and has the potential of inspiring a conspiratorial strategy which could impede the investigation. And such disclosure, in the very midst of an ongoing investigation (see *In re Bonanno*, 344 F.2d 830, 834 (2d Cir. 1965)), would also violate fundamental principles of grand jury secrecy.²⁷

For the same reasons a "full adversary hearing" on the nature of the conflict would have been damaging to important public interests. The district court, appropriately, did conduct a record inquiry to explore the views of the interested parties regarding the conflict, to

²⁷ In *United States v. Procter & Gamble Co.*, *supra*, 356 U.S. at 681 n. 6, the Supreme Court enumerated five reasons for grand jury secrecy: "(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

examine appellants relationship with Mr. Erlbaum and the other witnesses, to inform appellant of the legal ramifications of the problem, and to advise him of the court's assessment of the confidential materials. Insofar as the record of these proceedings shows, neither appellant nor Mr. Erlbaum ever requested a "full adversary hearing" on the conflict. Their expressed concern was to see the materials for themselves (A. 24). Moreover, a full adversary hearing relating to the substance of the confidential materials—a procedure which appellant demands now—would be nearly tantamount to disclosure of the materials themselves. Such a hearing, then, would surely threaten the public interests in an effective and secret grand jury investigation.

Appellant's claim might arguably be stronger if his purpose in obtaining the materials were to prepare a trial defense; if the materials in question were unlawfully procured by the government or otherwise tainted; or if the materials involved were voluminous and involved exceedingly complex and difficult judgments, as in some cases involving the relevance of electronic surveillance. See generally *United States v. Alderman*, 394 U.S. 165, 182-183 n.14, 184. But appellant's case involves none of these problems. We also submit that where the purpose of *in camera* review is to discern the existence *vel non* of a conflict of interest, it is particularly appropriate that such a judgment be entrusted to a neutral arbiter, subject to appellate review. Indeed, it is almost inconceivable that, under these facts, a court should have no power to review confidential materials to determine whether an improper conflict exists.

In light of these considerations, appellants procedural rights have been adequately safeguarded.

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Harvey Stone

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 31st day of October- 77
19 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

William M. Erlbaum, Esq.

The Honorable Robert P. Anderson

123-60 83rd Ave.

P.O. Box CCA

Kew Gardens, N.Y. 11415

Noank, Conn. 06340

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East,} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Harvey Stone

Sworn to before me this

31st day of October 19 77
Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 20, 1978